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No. ...-...

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

LOUIS TOM DRAGNA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a district court have jurisdiction to reduce the sentence of a defendant pursuant to Rule 35(b), where:

> (a) the sentence is reduced for the explicit purpose of placing the defendant in a halfway house "away from the kinds of people" that the court, after observing the defendant for an extended period of time and after looking into his background, believed the defendant doesn't belong with, and,
>
> (b) the defendant had not yet surrendered to the custody of the Attorney General to commence serving his sentence within the meaning of 18 U.S.C. § 3568?

2. Does the Court of Appeals have the authority to void the District Court's jurisdiction to reduce or modify a defendant's sentence by substituting its own sentence in place of the trial court's?

3. Where the Petitioner has served the entire one year term of the District Court's reduced sentence, or one half of the original two year sentence, do due process and equal protection call for this Court to reinstate the District Court's reduced sentence if certiorari is denied?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Louis Tom Dragna petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals [Appendix A, *infra*] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 29, 1984 [Appendix A] and was amended on July 5, 1984 [Appendix B]. A timely petition for rehearing and suggestion for rehearing en

banc was filed on June 11, 1984. The petition for rehearing and suggestion for rehearing en banc were denied on October 31, 1984. [Appendix C]. The jurisdiction of this Court to entertain a petition for writ of certiorari is conferred by Title 28, U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

Rule 35(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court may reduce a sentence . . . within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding a judgment of conviction . . .

18 U.S.C. § 3568 provides in pertinent part that:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of the sentence . . .

18 U.S.C. § 3577 provides that:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V to the United States Constitution provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner, Louis Tom Dragna, was charged and convicted of violating 18 U.S.C. Section 1962(c) and (d). The District Court initially sentenced him to concurrent two year terms on each of the two counts and imposed the maximum fine of $50,000.00. Petitioner remained free on bail pending appeal. The conviction was affirmed by this court in *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982), and on February 22, 1983 certiorari was denied (103 S.Ct. 1195).

Petitioner timely filed an application for reduction of sentence pursuant to rule 35(b) on June 21, 1983. On October 17, 1983, the District Court granted the Rule 35 motion after duly considering the briefs and oral argument of the parties. Petitioner's sentence was modified to include two consecutive six month terms of confinement in a community treatment center, and two years suspended sentence, five years probation, and the $50,000.00 fine retained. Petitioner was ordered to voluntarily surrender, and did surrender, to the designated community treatment center on October 31, 1983.

On November 15, 1983, the government filed its notice of appeal of the District Court's October 17, 1983 order reducing Petitioner's sentence. The United States Court of Appeals for the Ninth Circuit heard oral argument on May 8, 1984.

On May 29, 1984, the Court of Appeals issued an opinion earmarked for publication which vacated the District Court's judgment and remanded the case for reinstatement of the original sentence. The Court of Appeals held that the District Court was without jurisdiction to reduce Dragna's sentence as it did, and ordered the original sentence reinstated. [see Appendix A].

Petitioner timely filed a Petition for Rehearing; Suggestion for Rehearing En Banc on June 11, 1984. After reviewing the Petition for Rehearing, the government conceded, by letter dated June 18, 1984, the fourth argument in the Petition, namely, that both the government and the Court of Appeals were incorrect in explicating the reduced sentence that the District Court imposed. On July 5, 1984, the Court of Appeals issued an order which amended the text of its May 29, 1984 opinion to correctly reflect the reduced sentence. [see Appendix B].

After serving ten and one half months of the two six month terms of the reduced sentence, Petitioner was released on September 17, 1984 with credit for good time served. Petitioner has fulfilled, and continues to fulfill all of the terms and conditions of his reduced sentence as imposed by the trial court. On October 31, 1984, the Court of Appeals denied the petition for rehearing; and rejected the suggestion for rehearing en banc [see Appendix "C"]. On November 7, 1984, Petitioner timely filed an Application to the Ninth Circuit Court of Appeals for a Stay of Mandate Pending Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' unprecedented opinion is based upon its conclusion that the District Court was without jurisdiction to reduce Petitioner Dragna's sentence for the reasons that it did. Appendix "A", p. 2. The Court of Appeals rejected Petitioner's argument of what the record below reflects, premised its holding on its own erroneous interpretation of the factual record below, and relied upon cases which are factually inapposite to the instant case.

Although the Court of Appeals conceded that the length and type of sentence are determinations properly made by a trial court, it held that the District Court's

decision to reduce the sentence to a split sentence-type confinement in a halfway house was an improper assumption of jurisdiction over an executive function. Thus, the Court of Appeals' opinion improperly preempted the District Court's authority to resentence the Petitioner because of his concern regarding the defendant, and in order to keep him away from the types of people the court felt he didn't belong with.

Existing case law of this Court and of the Circuit Courts of Appeal, however, encourages the individualized inquiry made by the trial court below in fashioning appropriate sentences. Thus, clarification by this court is needed to settle the proper parameters of a District Court's jurisdiction in the fundamental area of resentencing.

From an early date, this Court has advanced the philosophy that punishment should fit the individual offender and not merely the offense. *Williams v. People of State of New York*, 337 U.S. 241, 247 (1949). A sentencing court is entitled to consider information from a wide variety of resources, obtained from "an inquiry broad in scope, largely unlimited either as to the kind of information [considered], or the source from which it may come," in reaching its determination of an appropriate sentence under the circumstances of a case. *Id.; United States v. Tucker*, 404 U.S. 443, 446 (1972); see also 18 U.S.C. § 3577.

A motion to reduce sentence pursuant to Rule 35(b) is part of the original criminal proceeding in which the offender was convicted and originally sentenced. *Heflin v. United States*, 358 U.S. 415, 418 n.7 (1959); *U.S. v. Guiterrez*, 556 F.2d 1217 (5th Cir. 1977). Thus, the exercise of informed discretion afforded a trial court in its initial sentencing decision likewise extends to the

resentencing inquiry. *United States v. Eddy*, 677 F.2d 656 (8th Cir. 1982).

The Rule 35 motion affords the sentencing judge an even greater exercise of discretion, however, since the function of the motion is to allow the judge to decide upon reflection that an original lawful sentence was unduly harsh. *United States v. Smith*, 650 F.2d 206, 208 (9th Cir. 1981); *United States v. Maynard*, 485 F.2d 247, 248 (9th Cir. 1973). The motion is in the nature of a "plea for leniency" directed to the court's discretion. *United States v. Krueger*, 454 F.2d 1154, 1155 (9th Cir. 1972).

A court reconsidering a sentence may decide the motion without holding a hearing or receiving testimony, *United States v. Maynard, supra; United States v. Krueger, supra;* and is not required to explain or justify its reasons for reducing or refusing to reduce a sentence. *United States v. Ursini*, 296 F.Supp. 1152, 1153 (D.C. Conn. 1968). A motion to reduce sentence will not be disturbed on appeal absent a clear abuse of discretion. *United States v. Sparrow*, 673 F.2d 862 (5th Cir. 1982); *United States v. Kouwenhoven*, 602 F.2d 234, 235 (9th Cir. 1979); *United States v. Krueger, supra* at 1155.

The position taken by the Ninth Circuit in the opinion below is unsupported by a single case to implicitly or explicitly hold that a trial court may not, on a Rule 35 motion, consider the nature of confinement, including a consideration of the types of inmates which an offender should or should not be housed with, or the security level of the place of confinement. Further, the cases relied upon by the Court of Appeals below in support of its finding that the District Court lacked jurisdiction to reduce sentence are not controlling, since the motions were in the nature of petitions for writs of habeas corpus where the petitioners had already surrendered to the

custody of the Attorney General and commenced serving sentence [see Appendix A].

In this case, unlike the cases cited by the Court of Appeals, the District Court had not yet required Petitioner Dragna to voluntarily surrender to the custody of the Attorney General, but allowed him to remain free on bail during the pendency of the Rule 35 proceedings. Jurisdiction over an offender begins at the time the offender is received in the custody of the agents of the Attorney General. *United States v. Huss*, 520 F.2d 598, 602 (2d Cir. 1975); 18 U.S.C. § 3568. Since the Bureau of Prisons did not have actual jurisdiction over Petitioner Dragna at the time of resentencing, the cases relied upon by the government and by the Court of Appeals are inapposite here and should not be used to encroach upon a District Court's resentencing discretion.

This careless grant of authority to the Attorney General via the Bureau of Prisons is an unwarranted erosion of the resentencing court's virtually limitless discretion as set forth in earlier pronouncements of this Court and by the legislature. Moreover, ratifying the Court of Appeals' opinion has the effect of vesting authority in the Bureau of Prisons over the type of sentence to be imposed *before an offender has been ordered by the trial court to surrender* to the custody of the Attorney General. Finally, the opinion is unsound for policy reasons, since it will foster judicial unaccountability by encouraging resentencing judges to decide Rule 35 motions without holding a hearing, allowing argument, or giving reasons for their ultimate rulings on the motions. The need for clarification by this Court is clear, since the opinion below will alter the administration of resentencing in the federal criminal justice system.

2. By reinstating the original sentence, the Court of Appeals denied Petitioner Dragna his absolute right to

timely present a motion for reduction of sentence to the District Court. Rule 35(b) of the Federal Rules of Criminal Procedure guarantees every lawfully sentenced offender a statutory right to move for a reduction of sentence within 120 days after entry of final judgment of conviction.

The Court of Appeals appears to follow the course taken in *United States v. Schafer*, 726 F.2d 155 (4th Cir. 1984), a case which is inappropriately relied upon by the Court of Appeals below (see discussion in Section 1, *supra*). The opinion completely removes the District Court's authority to reconsider Petitioner Dragna's Rule 35 motion and instead substitutes an appellate court's judgment, based on its review of the trial court's record below, that the original sentence should not be modified.

Due process and equal protection require that if the District court's judgment is to be vacated, the cause should be remanded to the District Court for reconsideration of the merits of Petitioner Dragna's Rule 35 motion subject to the sentencing constraints established by this Court. The Court of Appeals' decision to reinstate the original sentence was based on inappropriate considerations and denies Petitioner Dragna important fundamental rights. Thus, review by this Court, or, in the alternative, remand to the trial court is essential to maintain the consistent administration of the Federal Rules of Criminal Procedure.

3. As the statement of facts indicates, Petitioner Dragna was released from confinement on September 17, 1984, with credit for good time served, after completing ten and one half months of the twelve month term of the reduced sentence. His early release coupled with the fact that he remains under the government's supervision pursuant to the terms and conditions of his probation argue

well for the wisdom and validity of the District Court's reduction of sentence.

Although a reduction of sentence should not normally be made by a reviewing court, but is left to the sentencing court on remand[1], it is respectfully urged that this Court exercise its supervisory power over the administration of justice in the lower federal courts and reinstate the District Court's reduced sentence in the interest of justice. Alternatively, the equities of the underlying case call for this court to entertain a petition for writ of certiorari, or to remand to the trial court for further proceedings on the merits of Petitioner's Rule 35 motion.

CONCLUSION

The petition for writ of certiorari should be granted; or, in the alternative, this Court should either remand to the trial court for further proceedings on the Rule 35 motion, or reinstate the District Court's reduced sentence.

Dated: November 30, 1984.

Respectfully submitted,

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[1] *Yates v. United States*, 356 U.S. 363, 366-367 (1958).

APPENDIX A

FILED MAY 29, 1984 PHILLIP B. WINBERRY, Clerk, U.S. Court of Appeals in the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT No. 83-5275 DC No. CR 79-126(A)-TJH. UNITED STATES OF AMERICA, Appellant, vs. LOUIS TOM DRAGNA, Appellee. Appeal from the United States District Court for the Central District of California Terry J. Hatter, District Judge, Presiding. Argued and submitted May 8, 1984 *OPINION.*

Before: GOODWIN, SNEED and ALARCON, Circuit Judges PER CURIAM

Dragna was convicted in a jury trial of racketeering activities in violation of 18 U.S.C. § 1962(c) and (d) and sentenced to two concurrent two-year terms on each count and fined $50,000. This court affirmed the conviction. *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982).

After the Supreme Court denied certiorari, 102 S.Ct. 1195 (1983), the defendant filed a motion for reduction of sentence under Fed. R. Crim. P. 35(b). The district court reduced the sentence to six months in a community treatment center and two years suspended sentence, retaining the fine.

Review of the transcript from the sentence reduction hearings indicates that the district judge attempted to use his power under Rule 35 to assure that the defendant would not be placed in a custodial facility selected by the Bureau of Prisons in keeping with its internal regulation concerning persons convicted of RICO offences. By attempting to assert authority over the location of confinement, the district court exceeded its jurisdiction under the resentencing statute. While a judge has wide discretion in determining the length and type of sentence, *United States v. Warren*, 610 F.2d 680, 684 (9th Cir.

1980), the court has no jurisdiction to select the place where the sentence will be served. Authority to determine place of confinement resides in the executive branch of government, 18 U.S.C. § 4082(a), and is delegated to the Bureau of Prisons. Because the district court was without jurisdiction to reduce Dragna's sentence as it did, reinstatement of the original sentence is appropriate. *United States v. Schafer*, 726 F.2d 155 (4th Cir. 1984).

The district court's judgment is vacated and the case is remanded for reinstatement of the district court's original sentence.

0813A/0020A

APPENDIX B

Filed July 5, 1984. Phillip B. Winberry, Clerk, U.S. Court of Appeals, in the United States Court of Appeals for the Ninth Circuit No. 83-5275. United States of America, Appellant, v. Louis Tom Dragna, Appellee ORDER.

Before: GOODWIN, SNEED and ALARCON

The opinion entered herein on May 29, 1984, is amended as follows:

On page 2348 of the slip opinion, second column, second paragraph in text of the opinion, fifth line into paragraph, (page 1, line 20, of typed opinion), delete "six months" and insert "two consecutive six month confinements".

The last sentence of the second paragraph of the opinion will then read: "The district court reduced the sentence to two consecutive six month confinements in a community treatment center and two years suspended sentence, retaining the fine."

APPENDIX C

Filed October 31, 1984 Phillip B. Winberry, Clerk, U.S. Court of Appeals in the United States Court of Appeals for the Ninth Circuit No. 83-5275. United States of America Appellant, v. Louis Tom Dragna, Appellee ORDER.

Before: GOODWIN, SNEED and ALARCON, Circuit Judges

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.